

Public Law Board No. 6204

Parties to Dispute

Brotherhood of Maintenance of Way
Employees

vs

Burlington Northern Santa Fe

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Case 1/Award 1

Statement of Claim

1. That the dismissal of Grinder Operator S. S. Hughley for his alleged failure to give factual information and being dishonest when filling out timeroll dated August 30, 1996 when claiming eight (8) hours' pay for August 23, 1996 was without just and sufficient cause and based on unproven charges.
2. Grinder Operator S. S. Hughley shall now be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered. The censure and dismissal shall be removed from his personal record.

Background

The Claimant was advised to attend an investigation to determine facts and place responsibility, if any, in connection with his alleged failure to give factual information and with being dishonest when filling out timeroll dated August 30, 1996. An investigation was held as scheduled and on October 4, 1996 the Claimant was advised that he had been found guilty as charged. He was discharged from service of the Carrier. Thereafter an appeal was made by the Organization on grounds that the discipline assessed was improper. This appeal was made up to and including the highest Carrier officer designated to hear such. Absent settlement of the claim on property it was subsequently docketed before this Board for final adjudication.

During the processing of the claim on property the Claimant was reinstated by the Carrier's Division Superintendent "...as a matter of managerial leniency..." with seniority

unimpaired with right to further process claim for time lost as a result of his dismissal. Relief involved in this case is, therefore, for actual time lost by the Claimant because of the Carrier's actions.¹

Procedural

There is an objection by the Organization that the Claimant was discharged for certain alleged violations with which he was never charged. A review of the record by the Board warrants conclusion that this is correct. The conclusion by the Carrier's officers that the Claimant was guilty of failure to follow instructions is without foundation. The Claimant was never charged with this infraction, nor was such subject bridged at the investigation nor subsequently handling of the case on property. The Carrier has failed to meet its burden on this issue and the Board must rule accordingly. The Carrier's conclusions with respect to insubordination by the Claimant represents an inappropriate expansion of the original charge against the Claimant.²

Discussion

The Claimant held assignment as Grinder Operator at Keenesburg, Colorado. His hours on Friday, August 23, 1996 were 7:30 AM to 4:00 PM. According to Road Master Underwood who supervises both the Claimant and his fellow worker who is Welder Park, he showed up at Keenesburg, Colorado at about 1:30 PM on the above captioned date and the Claimant at that site had already left for home. So had the Claimant's fellow worker and supervisor, Welder Park. According to testimony at the investigation Welder Park is considered to be the Claimant's

¹See Carrier's Exhibit 5. Letter to the Vice Chairman of the Organization by the Division Superintendent laying out stipulations for Claimant's return to work is dated February 13, 1997.

²On this issue see Third Division Award 20686 inter alia.

supervisor. Road master Underwood stated that the Claimant "...reports to and receives instructions from Mr. Park, along with (himself), if (he) has any instructions for him...". This is not disputed.

Testimony by Mr. Park at the investigation is that he was "...on his way home..." by the time Road Master Underwood arrived at Keenesburg on the day in question. Park's rationale for leaving early was that they had worked "...all week during lunch hour, non-stop and that was why (he) figured (they) had that overtime coming in order to take off early...". Mr. Park stated that he had no authorization to rearrange his hours but it was still his belief that he had violated no rule on the day in question. This witness testified that he had discussions earlier in the year with Mr. Underwood about leaving an assignment early and Underwood had told him that "...he didn't want (him) doing it...". According to this witness, when Road Master Underwood gives instructions to both he and the Claimant the Road Master gives those instructions just to him "usually" and the Claimant may not know about them. According to all testimony at the investigation, Mr. Underwood does not give instructions directly to the Claimant. Park also states that the Claimant is not involved in the filling out of the timeroll and as the Claimant's immediate supervisor he takes care of that. Mr. Park looks at his relationship to the Claimant as if they are a team and he is the captain. For the period of August 16-30, 1996 Park listed both straight time and overtime on the timeroll which represented the actual time worked, according to his testimony. This included 88 straight time hours and 4 hours of overtime. According to Park it is "...customary for people working away from home assignments to trade off time worked early in the week to extend week-ends...". Park explained that this is what he did on August 23, 1996. It was a trade-off and he explained that he did not think that he was dishonest in reporting the actual

total number of hours worked during the latter half of August of 1996 either for himself or for the Claimant albeit they did leave early on Friday afternoon of August 23, 1996. On the latter day he reported eight (8) hours' straight time pay for himself and for the Claimant when he filled out the time rolls for the both of them.

Testimony by the Claimant is that he views Mr. Park as his supervisor or foreman. According to the Claimant he had Mr. Park's authorization to have left early on the afternoon of August 23, 1996. He states that as it was explained to him he had time to take off early since they had already worked to cover the time off. He testified that he was "...told we were gonna take that time off and just put it on the timeroll...". The Claimant states that he believed he had proper authority to leave when he did on the day in question because it was cleared with Mr. Park. He testified that he had never received any order from Road master Underwood, about anything, but that it was a "...brand new job..." at Keenesburg for him. The Claimant also states that he is aware of a practice on this property to exchange time during the week in order to take off early on Fridays and he intimates that this is what he basically thought was going on on the day in question. According to the Claimant he knows that this "...has been done..." at other locations. He states that he had never heard Mr. Underwood state one way or another that this practice was not proper.

Findings

The instant case centers on whether the Claimant was dishonest when "...filling out the timeroll..." for the date of August 23, 1996. First of all, the Board observes, after study of the record, that the Claimant never filled out the timeroll for that day. According to his own testimony, which was not rebutted at the investigation, he does not fill out the timeroll and has no

input into doing this. This testimony is corroborated by Welder Park, who was his immediate supervisor who did fill out and sign the timeroll for the day in question. The Claimant's testimony on this point is further corroborated by Road Master Underwood who stated that the timeroll for both Park and the Claimant had been filled out on August 30, 1996 and handed in by Park.

Condensed to its bare essentials the instant case before the Board is a theft case. The Claimant is accused of collecting wages for work not performed. Forums in this and other industries have held that the evidentiary burden of the employer in such instances is somewhat higher than in other types of cases involving discipline.³

There is insufficient evidence of record to warrant conclusion that the Claimant in this case is guilty of the serious charge of theft. It was a new job to him. He was following the lead of his immediate supervisor. Both he and the supervisor testified that nothing was on the timeroll which had not been worked in terms of cumulative hours although the Claimant does admit that Park had substituted one time-frame for another. But it is unclear if the Claimant really knew exactly what Park had put on the timeroll since he basically had nothing to do with it. The Claimant stated that what Park had done was sometimes customary. This appears to be correct. According to one of the Organization representatives at the investigation, the custom of doing what Welder Park did for the date of August 23, 1996 when he filled out the timeroll:

"...is quite common in the track department in this area, where the time recorded on a

³See Third Division Award 23976 wherein the Board enunciated the principle that: "...there is little debate that theft or misappropriation of property is an offense warranting dismissal. However, the quantum of evidence to substantiate such a charge is of a considerably higher nature than that required in other types of discipline cases...". Some arbitrators would argue that the burden of the moving party in theft cases rises to the evidentiary standards used in criminal law forums. The neutral member of this Board is not of that persuasion. Nevertheless, there is no doubt that the evidentiary standards to be used in theft cases, as a matter of fairly universal arbitral precedent, are more rigorous than in other types of discipline cases.

daily basis of time rolls, does not reflect the actual hours worked on an individual day. However, (the trackmen) do work, (then) they do total the number of hours worked in the half (month). We have a number of crews that perform this regularly, and is, it's quite well known and accepted by the exempt supervision on this property..."

This statement of practice is not rebutted by the Carrier in the record before this Board.

TR Road MR
Apparently ~~Yard~~ Master Underwood was not in agreement with this custom. But there is no evidence that he informed the Claimant of this although he had, according to Park's testimony, informed the latter of his sentiments on this practice. But there is not evidence that Park ever TR Road MR informed the Claimant of what the ~~Yard~~ Master thought of the practice. And the ~~Yard~~ Master has TR Road MR never given the Claimant any direct order.

Upon the full record before it the Board is unable to conclude that the Carrier has sufficiently met its burden of proof in this case. The Board will rule accordingly.

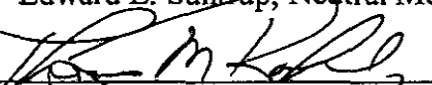
The claim is sustained. The Claimant shall be compensated for all time lost because of his discharge (later: suspension), result of notice sent to him on October 4, 1996 by the Superintendent of Operations at Denver, Colorado. Cumulative compensation for time lost to be paid to the Claimant shall be minus any outside earnings. Any and all information relating to the discipline assessed the Claimant on October 4, 1996 shall be removed from the Claimant's record.

Award

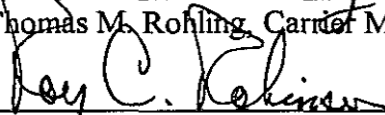
The claim is sustained in accordance with the Findings. All compensation due the Claimant as a result of this Award shall be paid to him by the Carrier within thirty (30) days of the date of this Award.



Edward L. Suntrup, Neutral Member



Thomas M. Rohling, Carrier Member



Roy C. Robinson, Employee Member

Date: December 15, 1999